Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHNNY DACCARETT-GHIA; HIS WIFE, DELIA NAVARRO RUIZ DE DACCARETT; AND ESTATE OF MR. ABEL NAVARRO ALVAREZ, FRIKO CORPORATION SHAREHOLDERS

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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115 pp

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Shareholders of a Closely Held Foreign Corporation That Owens Investments In Its Name Have Standing To Assert A Claim When Those Funds Are Seized, When Said Closely Held Corporation Has Been Found To Be Void Due To The Nominee Or Ultra Virus Doctrine In One Circuit, But Found to Be Valid In Another Circuit, As Well As By The Internal Revenue Service For Purposes Of Payment of Federal Taxes?

LIST OF PARTIES

The parties that have appeared here include those listed on the case caption. As this is a Government initiated forfeiture action, the parties below also included, as named defendants, the Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.

Friko Corporation is a closely held family investment corporation with shares owned only by Mr. Johnny Daccarett-Ghia; his wife, Mrs. Delia Navarro Ruiz de Daccarett; and the Estate of Mr. Abel Navarro Alvarez.

Friko Corporation has no parent companies or subsidiary companies.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iii

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:
Department of Labor v. Berlanti, 481 A.2d 830, 832 (1984) 11

Flast v. Cohen, 392 U.S. 83, 98-99 (1968) 13

Friko Corp. vs. Commissioner of Internal Revenue, 26 F.3rd 1139 (D.C. 1994) 11

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977) 10

United States v. $28,570 U.S. Currency, 950 f.2d 1108, 1112(5th Cir. 1992) 15

United States v. $38,570, U.S. Currency, 950 F.2d 1108 (5th Cir. 1992) . . . 13

United States v. $47,875.00 in U.S. Currency, 746 F.2d 291, 293 (5th. Cir. 1984) 15

United States v. a Single Family Resident, 803 f.2d 625, 630 (11th Cir. 1986) 16

United States v. Forfeiture, Stop Six Center, 781 F.SUPP. 1200, 1202 (N.D. Tex. 1991) 13

United States v. Johnny Daccarett et al., 801 F.SUPP 984, 6 f.3rd 37 (2nd Cir. 1993) 12

United States v. Miscellaneous Jewelry, 667 F.supp. 232, 235-36(d.Md. 1987) 15

United States v. One 18th Century Colombian Montstrance, 797 f.2d. 1370, 1375 (5th /cir. 1986) 15

United States v. One Parcel of Land Known as Lot 111-B, 902 F.2d 1433, 1444 (9th Cir. 1990) 16

United States v. One Parcel of Real Property, 942 f.2d 74, 78 (1st Cir. 1991) 15

United States v. Premises Known as 536 Liscum Drive, 866 F. 2d 213, 217(6th Cir. 1988) 16

Department of Labor v. Berlanti, 481 A.2d 830, 832 (1984) 11

Flast v. Cohen, 392 U.S. 83, 98-99 (1968) 13

Friko Corp. vs. Commissioner of Internal Revenue, 26 F.3rd 1139 (D.C. 1994) 11

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977) 10

United States v. $28,570 U.S. Currency, 950 f.2d 1108, 1112(5th Cir. 1992) 15

United States v. $38,570, U.S. Currency, 950 F.2d 1108 (5th Cir. 1992) . . . 13

United States v. $47,875.00 in U.S. Currency, 746 F.2d 291, 293 (5th. Cir. 1984) 15

United States v. a Single Family Resident, 803 f.2d 625, 630 (11th Cir. 1986) 16

United States v. Forfeiture, Stop Six Center, 781 F.SUPP. 1200, 1202 (N.D. Tex. 1991) 13

United States v. Johnny Daccarett et al., 801 F.SUPP 984, 6 f.3rd 37 (2nd Cir. 1993) 12

United States v. Miscellaneous Jewelry, 667 F.supp. 232, 235-36(d.Md. 1987) 15

United States v. One 18th Century Colombian Montstrance, 797 f.2d. 1370, 1375 (5th /cir. 1986) 15

United States v. One Parcel of Land Known as Lot 111-B, 902 F.2d 1433, 1444 (9th Cir. 1990) 16

United States v. One Parcel of Real Property, 942 f.2d 74, 78 (1st Cir. 1991) 15

United States v. Premises Known as 536 Liscum Drive, 866 F. 2d 213, 217(6th Cir. 1988) 16

Miscellaneous:

1 Smith, Prosecution & Defense of Forfeiture Cases, 9.04(b)(i) . . . 14

12 Moore's Federal Practice, par. 300.02 [.2-3] 14

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeal for the Third Circuit issued on October 19, 1998, is unpublished and is reproduced in the appendix to this petition at A-1.

The August 12, 1997, bench decision of the United States District Court for the District of New Jersey is unreported, and is reproduced in the appendix to this petition at A-11.

The opinion of the United States Court of Appeal for the Third Circuit issued on July 22, 1992, affirming use of nominee or *ultra virus doctrine* and fugitive disentitlement doctrine is published at 971 F2d. 974 (3rd Cir. 1992), and is reproduced in the appendix to this petition at A-30.

The opinion of the United States Court of Appeal for the District of Colombia issued on June 24, 1994, in Friko Corp., Johnny Daccarett, as Alleged Alter Ego or Nominee of Friko Corporation vs. Commissioner of Internal Revenue, reversing and remanding for reconsideration of the use of the fugitive disentitlement by the United States Tax Court, is published at 26 F.3rd 1139 (D.C. 1994).

The opinion of the United States Court of Appeal for the District of Colombia issued on November 28, 1995 (Docket No. 95-1029), in Johnny Daccarett-Ghia, Alleged Alter Ego or Nominee of Friko Corp. vs. Commissioner of Internal Revenue, reversed and remanded the Tax Petition to the United States Tax Court based on the rejecting of the use of the fugitive disentitlement doctrine, is published at 34 F.3rd 1239 (D.C. 1996).

The September 5, 1997, decision of the United States District Tax Court, Friko Corporation v. Commissioner of Internal Revenue, Docket No. 26693-91, providing for the payment of U.S. taxes by taxpayer Friko Corporation, is unreported, and is reproduced in the appendix to this petition at A-75.

The September 5, 1997, decision of the United States Tax Court, Johnny Daccarett, alter Ego, Nominee of Friko Corporation v. Commissioner of Internal Revenue, Docket No. 22854-92, providing for no U.S. taxes due by Mr. Johnny Daccarett-Ghia is unreported, and is reproduced in the appendix to this petition at A-77.

The Internal Revenue Certificate of Release of Federal Tax Lien owed by Friko Corporation, dated February 2, 1998, in the name of Taxpayer Friko Corporation, A CORPORATION, is reproduced in the appendix to this petition at A-79.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 19, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The Government brought this civil forfeiture case in New Jersey in 1990, pursuant to 18 U.S.C. 981(a)(1), invoking the rules of admiralty codified in the Supplemental rules of civil Procedure. Friko Corporation (Friko) filed a claim under rule C(6), and among other things moved to dismiss the case because the *res* was not located in New Jersey. The District Court rejected Friko's jurisdictional objection, and then used first the nominee or *ultra virus* doctrine, and then the fugitive disentitlement doctrine to strike the claim on the basis that Friko did not have standing (A-23), and its Chief Operating owner and controlling shareholder was the owner of the *res*. Friko filed a motion under Fed. Rule Civ. P. 60(b), with over 6000 pages of corporate documents as a basis to reconsider the District Court's ruling, which the District Court denied.

Friko in 1991 appealed the District Court's order. In 1992, the Third Circuit reversed in part, although affirming the fugitive disentitlement doctrine. The Court of Appeals ordered the District Court to decide under the Rule 60(b) motion, whether additional information provided by Friko could be considered to permit the use of the

nominee or *ultra virus* doctrine, so to establish the company's standing.

Subsequent to the above remand order, on November 10, 1992, pursuant to amended 28 U.S.C. 1355(d), which provided for nation wide service in rem forfeiture, the Government via a letter request received a warrant to re-arrest the assets held by Merrill Lynch in the name of Friko.

While Friko's remanded Fed. Rule Civ. P. 60(b) motion, challenging the use of the nominee or *ultra virus* doctrine was under consideration by the District Court, on December 29, 1992, Mrs. Delia Navarro Ruiz, Friko Secretary, filed a claim on behalf of Friko to the re-arrested over three million dollars held in its name by Merrill Lynch.

Because by January, 1995, the District Court had failed to comply with the remand order of July, 1992, and thereby reconsider its use of the nominee or *ultra virus* doctrine, Friko filed a Petition for Writ of Mandamus, Docket Nos. 95-5006. The Court of Appeals was advised of the related and conflicting controlling decisions of the United States Court of Appeals for the District of Colombia, discussed below.

On September 28, 1995, the District Court denied the motion filed under Fed. Rule Civ. P. 60(b), reaffirming its use of the nominee or *ultra virus* doctrine,

and that Mr. Johnny Daccarett was the owner of the three million dollars held in the Corporation's name. A timely Notice of Appeal to the Third Circuit was filed by Friko on October 30, 1995.

Prior to a decision on Friko's appeal challenging the use of the nominee or *ultra virus* doctrine, on January 22, 1996, to protect their interest in the property seized in case the District Court's order is affirmed, Mr. Johnny Daccarett, Mrs. Delia Daccarett, and the estate of Abel Navarro Ruiz, Friko's shareholders, filed individual claims to their share of the three million dollars held in Merrill Lynch.

On August 12, 1996, the United States Court of Appeal for the Third Circuit issued a certified copy of an order in lieu of a Mandate affirming the decision of the District Court finding that due to the nominee or *ultra virus* doctrine Friko lack standing to file a claim.

Simultaneous, the decisions of the United States Tax Court dismissing the Petitions of Friko and Johnny Daccarett based on the above decisions Judge Barry and the Third Circuit, as to nominee or *ultra virus* doctrine, and the use of the fugitive disentitlement were reversed on appeal by the United States Court of Appeal for the District of Colombia: first, to be issued on June 24, 1994, in Friko Corp. vs. Commissioner of Internal

Revenue, 26 F.3rd 1139 (D.C. 1994), reversed and remanded for reconsideration the fugitive disentitlement by the United States Tax Court; second, on November 28, 1995 (Docket No. 95-1029), in Johnny Daccarett-Ghia, Alleged Alter Ego or Nominee of Friko Corp. vs. Commissioner of Internal Revenue, 34 F.3rd 1239 (D.C. 1996), reversed and remanded the Tax Petition to the United States Tax Court based on the rejecting of the use of the fugitive disentitlement doctrine.

On September 5, 1998, the United States Tax Court, assessed Friko $127,000.00 for taxes due for the period of 1985 through 1989; and no taxes due by Mr. Johnny Daccarett (A-75 and A-77).

On October 19, 1998, the Internal Revenue Service issued a release of Tax Lien to Taxpayer Friko Corporation. (A-79).

Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

The District Court struck the individual claims filed by Friko's shareholders, including that of Mr. Johnny Daccarett, as untimely, although filed prior to a decision on Friko's appeal of its challenge to the use of the nominee or *ultra virus* doctrine, and fugitive disentitlement doctrine. The

District Court's decision was based on affidavits and accompanying documents. No testimony was taken. In short, the District Court held that Friko lack standing to file a claim since the property was that of the chief shareholder, but too the chief shareholder was barred to file a claim.

On August 12, 1996, eight months after the shareholders claims were filed, the United States Court of Appeal for the Third Circuit issued a certified copy of an order in lieu of a Mandate, affirming the Judgement of the District Court.

However, at the same time in the United States district Court for the District of Colombia and the United States Tax Court, Friko Corporation and its shareholders had standing to file a Petition to challenge the Internal Revenue Service tax assessment, pay settlement of taxes for the period of 1985 through 1989, and to obtain a release of Tax lien.

REASONS FOR GRANTING THE WRIT

I. **THIS CASE PRESENTS QUESTIONS RETARDING WHAT BURDEN EXISTS AND UPON WHOM THEY ARE PLACED WHEN THE SHAREHOLDERS OF A CLOSELY HELD CORPORATION MAKES A CLAIM FOR FUNDS THAT ARE HELD IN THE CORPORATE NAME AFTER ONE CIRCUIT AFFIRMS THE USE**

OF THE NOMINEE OR *ULTRA VIRUS* DOCTRINE, AND ANOTHER CIRCUIT SAID DOCTRINE IS DISALLOWED, AND THE CORPORATION PAYS U.S. FEDERAL TAXES.

This case presents significant questions about standing and the right of shareholders of a closely held corporation to make claim for funds deposited in the corporate name, after one Circuit permits the use of the nominee or *ultra virus* doctrine, and another Circuit disallows the use of said doctrine, and the Corporation pay over $100,000.00 in U.S. taxes. It presents questions not yet addressed by this Court, concerning the use of the nominee or *ultra virus* doctrine to disallow the claim of a corporation, and what and when must its shareholder show to then have a valid claim to corporate assets in an *in rem* forfeiture proceeding.

To date, as the record shows, the lower courts are addressing these issues on an *ad hac* approach, with rulings being created on a case by case basis, not being published, and without the effect of precedent.

This Petition presents a question where the decision of the United States Court of Appeals for the Third Circuit has entered a decision in conflict with a prior decision of the United States Court of Appeals for the District of

Colombia, on an important matter regarding corporate law. In the alternative, this Petition should be considered because the Third Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings by the District Court of New Jersey, as to call for an exercise of the supreme Court's supervisory power.

It would seem beyond cavil that a corporation has standing to assert a claim for property held in its name. *See, e.g. Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

The courts below did not quarrel with this concept. However, what the Third Circuit sanctioned was that although Friko lacked standing to file a claim to the three million dollars held in its name by Merrill Lynch, because it did not adequately establish its trade or business or its existence independent of its Chief Operating Officer and major shareholder, Johnny Daccarett, the shareholders claims were invalid apparently because they were not filed during the same time period that Friko was still fighting against the use of the nominee or *ultra virus* doctrine.

The challenge decisions are inconsistent with general corporate law, or under the law of the State of New Jersey, wherein the law is that a corporation is an entity separate and distinct from its stockholders. Thus only until

after the corporate veil has been pierced can either stockholder sue or be sued in their individual name. *See, e.g. Department of Labor v. Berlanti*, 481 A.2d 830, 832 (1984). Furthermore, the challenged decision are inconsistent with the holding of both the United States Court of Appeals for the District of Colombia in *Friko Corp. vs. Commissioner of Internal Revenue*, 26 F.3rd 1139 (D.C. 1994), reversed and remanded; and in *Johnny Daccarett-Ghia, Alleged Alter Ego or Nominee of Friko Corp. vs. Commissioner of Internal Revenue*, November 28, 1995 (Docket No. 95-1029), 34 F.3rd 1239 (D.C. 1996), reversed and remanded.

The record establish that from the date of remand order of July 22, 1992,(A-30) issued by the Third Circuit directing the District Court to reconsider Friko's Fed. Rule Civ. P. 60(b) motion challenging the use of the nominee or *ultra virus* doctrine, until the Third Circuit's decision issued on August 12, 1996, confirming the use of the nominee or *ultra virus* doctrine, Friko was at all times asserting its right to standing to file a claim to the *$3,0000,0000.00*, held in its name by Merrill Lynch.

Finally, what the record shows is that Friko Corporation was assessed and paid U.S. taxes on the funds held by Merrill Lynch in its name (A-79), the

same time that the Third Circuit and the District Court held that Friko Corporation lacked standing to file a claim for said assets.

The record further shows that the claims filed by Friko's shareholders, including that of Mr. Johnny Daccarett, on January 22, 1996, were filed prior to the August 12, 1996, only in the alternative to protect the shareholders interest in the assets deposited with Merrill Lynch in Friko name, if Friko was again found to lack standing.

Juxtaposed to the record, what Friko and its shareholders were required to show remains unclear.

Throughout the proceedings below, which were decided entirely by the District Court in Chambers, based on affidavits and accompanying documents, with no testimony being taken, despite the request for both hearing and jury trial, the Government vaguely linked Mr. Daccarett to illegal activity, but since the *in rem* forfeiture action was not decided on the merits, Mr. Daccarett had no opportunity to refute the Government's allegations, as he did in the related jury trial in *United States v. Johnny Daccarett et al.*, 801 F.SUPP 984, 6 f.3rd 37 (2nd Cir. 1993), *cert. denied*. Meanwhile, the Government implied some impropriety in Friko's 441,000.00 loan to Saad before the underlying alleged money laundering conspiracy had begun.

But raising these points only demonstrates why this Court must address the standing of the shareholders in the civil forfeiture context: by referring to them, the lower courts required Friko and its shareholders to disprove the merits of the Government's case, without having standing to file a claim and an opportunity to be heard. This conflicts with both the holding of the United States Court of Appeals for the District of Colombia, as well as with other circuits that warn against trying the underlying case in order to determine standing. *See, e.g. United States v. $38,570, U.S. Currency*, 950 F.2d 1108 (5th Cir. 1992); *see also United States v. Forfeiture, Stop Six Center*, 781 F.SUPP. 1200, 1202 (N.D. Tex. 1991).

Moreover, with no standard to guide it as to the rights of the shareholder, the challenged decisions are internally inconsistent since both the District court and the appellate court held that Friko was Daccarett's nominee or *ultra ego*, yet struck his claim.

This court's silence has led the Circuits into a crazy-quilt approach which has taken place here to analyzing standing of shareholders, and when does it take effect.

This may not be surprising, as this Court described the concept as one of "the most amorphous . . . in the entire domain of public law." *Flast v. Cohen*,

392 U.S. 83, 98-99 (1968). The point of establishing shareholder standing should be simply to insure that a stockholder claimant has that "concrete adverseness" that does not conflict with the right of the corporation and helps define issues, *see, e.g.* 12 Moore's Federal Practice, par. 300.02 [.2-3], and either the corporation or its shareholders which own the *res* would certainly possess that. If either Friko or its shareholders could not satisfy that standard, then it was because, as one commentator has pointed out, standing concepts have been applied more rigidly in civil forfeiture cases then in other areas of the laws. 1 Smith, Prosecution & Defense of Forfeiture Cases, 9.04(b)(i),i.e. the instant holdings of the U.S. Tax Court A-75.

No reason for such a differing approach exists, and this Court has certainly never authorized one, particularly where shareholders of a corporation found to be *ultra virus* makes a claim. Standing should not exist as a procedural trap-door designed to thwart claimants based on how the Courts chooses to vies the case at any particular moment in time.

In all event, the present state of the law present hodge-podge decision-making, precisely because no standard exist.

To establish standing, some courts would seem to require little more than

facially colorable interests in the *res*, *see, e.g., United States v. One 18th Century Colombian Montstrance*, 797 f.2d. 1370, 1375 (5th /cir. 1986), or any "recognizable legal or equitable interest." *United States v. $47,875.00 in U.S. Currency*, 746 F.2d 291, 293 (5th. Cir. 1984). Based on this standard the shareholders right to standing, and their claim filed in January of 1996, took effect once the District Courts decision was affirmed in August of 1996 by the Third Circuit.

On the other hand, some courts have strayed from the "legal or equitable" to require an "ownership or possessory" interest. *See United States v. One Parcel of Real Property*, 942 f.2d 74, 78 (1st Cir. 1991); *United States v. Miscellaneous Jewelry*, 667 F.supp. 232, 235-36(d.Md. 1987), *aff'd sub nom.* Certainly, based corporate law, this standard confirmed the shareholders right to standing, and to have their claim heard which was filed in January of 1996, once
the District Courts decision was affirmed in August of 1996 by the Third Circuit.

Then again, courts requiring possessory interest sometimes require "some" ownership interest, thus moving possession or ownership to possession plus ownership. *See, e.g. United States v. $28,570 U.S. Currency*, 950 f.2d 1108,

1112(5th Cir. 1992). Still others speak of some "dominion and control" over the *res, see, e.g. United States v. a Single Family Resident*, 803 f.2d 625, 630 (11th Cir. 1986), but what the phrase actually requires is unclear.

Most courts hold that simple legal title is insufficient, *see United States v. Premises Known as 536 Liscum Drive*, 866 F. 2d 213, 217(6th Cir. 1988); *United States v. One Parcel of Land Known as Lot 111-B*, 902 F.2d 1433, 1444 (9th Cir. 1990)(per curiam), but this, again, veers from those cases requiring a legal or equitable interest only.

In any case, the holding of the Third Circuit, and the district Court, flies in the face of all of the above analysis on standing and when it takes effect. The appellate court in the instant case apparently found that Friko failed to show any business beyond its holding legal title, yet legal title is what entitled Friko to make its claim, regardless of its business. Unless, of course, Friko's business controlled its right to make a claim, in which case the court was actually requiring Friko to address the merits of the underlying claim, a position in conflict with other Circuits. In addition, the Third Circuit upheld the striking of the claims of the shareholders although filed eight months prior to the a final decision of Friko's standing.

The rights of the shareholder must be identified by this court, given the conflict between the holdings herein challenged, with the related decisions of both the United States Court of Appeals for the District of Colombia and the United States Tax Court. Otherwise, the hodge-podge decision-making will continue, and lead to unjust results like in the instant case, where although neither Friko nor its shareholders has standing to contest the seizure of over $3,000,000.00 of assets on the merits, yet the Friko and its shareholders had standing to contest a tax assessment, and settle litigation in by paying over $100,000.00 in U.S. taxes on said funds seized.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Third Circuit, so to resolve this dispute between the holdings in the two circuits.

Respectfully submitted,

MR. JOHNNY DACCARETT-GHIA,
MRS. DELIA NAVARRO RUIZ DE DACCARETT,
AND ESTATE OF MR. ABEL NAVARRO ALVAREZ

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APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 985000

UNITED STATES OF AMERICA

v.

CONTENTS OF ACCOUNTS NOS. 3034504504 AND 144-07143 AT MERRILL, LYNCH, PIERCE, FENNER AND SMITH, INC.

*Friko Corp. Shareholders
*Mr. Johnny Daccarett-Ghia;
his wife, *Mrs Delia Navarro Ruiz de Daccarett;
*Estates of Mr. Abel Navarro Alvarez,
Appellants

(*Pursuant to Rule 12(a), F.R.A.P.)

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil No. 90-cv-01262)
District Judge: Honorable Maryanne Trump Barry

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 17, 1998
BEFORE: STAPLETON and ROTH, Circuit Judges, and HOEVELER, *District Judge

(Opinion Filed OCT 19 1998)

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* Honorable William M. Hoeveler, Senior United States District Judge for the Southern District of Florida, sitting by designation.

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge:

Shareholders of Friko corporation appeal the district court's order striking their claims to certain accounts at Merrill, Lynch, Pierce, Fenner & Smith ("Merrill Lynch") and granting the government default judgment in this civil in rem forfeiture action under 18 U.S.C §981. Because we conclude that appellants are time barred from asserting their claims, we will affirm.

In 1990, the United States filed this in rem action in the United States District Court for the District of New Jersey claiming forfeiture of accounts 3034504504 and 144-07143 held by Friko corporation with Merrill Lynch in New York. The district court struck Friko's timely claim concluding that Friko was merely a sham corporation with no cognizable claim to the property and therefore lacked standing. This court affirmed that decision, but determined that the district court lacked in rem jurisdiction to conclusively determine the ultimate forfeiture issued because the district court lacked the power to serve process over the res located outside the district. U.S. v. Accounts Nos. 3034504504 & 144-07143, 971 F. 2d 974, 983 (3d Cir. 1992). Subsequently, however, Congress amended 28 U.S.C. § 1355(d) to provide for nationwide

service of process in in rem forfeiture actions. On November 10, 1992, the government utilized §1355(d) to arrest the accounts in New York. Over three years later, on January 22, 1996, the shareholders filed individual claims to the accounts. The district court struck the claims in an order dated August 12, 1997.[1]

Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims governs civil in rem forfeiture proceedings. See U.S. vs. $184,505.01 In U.S. Currency, 72 F. 3d 1160, 1163 (3d Cir. 1995); 28 U.S.C. § 2461(b). Rule C provides:

> The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall file an answer within 20 days after the filing of the claim.

Id. C(6). In this case, the accounts were arrested on November 10, 1992. Public notice was published in the New

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[1] On December 29, 1992, Mrs. Delia Navarro Ruiz, Friko's Secretary and a member of Friko's board of directors, filed a claim on behalf of Friko corporation regarding the accounts. This court, however, had already held that Friko had no claim to the accounts. Mrs. Ruiz did not file a personal claim in her capacity until January 22, 1996.

York Post and Newark Star Ledger on the 1st, 8th and 15th of September 1993. The shareholders did not file their claims until January 22, 1996. This is clearly outside 10 day period required by Rule C. Moreover, the record indicates that the shareholders did not file an answer. Accordingly, we conclude that the shareholders are time barred from asserting their claims and will affirm the district court's order striking their claims.[2]

TO THE CLERK:

Please file the foregoing Memorandum Opinion

/s/
Circuit Judge

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2 We express no opinion regarding the district court's alternative conclusion that the shareholders have no claim to the property because this court's prior decision determined that Friko was a sham corporation with no interest in the accounts. Instead, we affirm solely on the ground that the shareholders are time barred under Rule C.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:
	:
Plaintiff	:Civ Action No
	: 90-1262 (MTB)
v.	:
	:
CONTENTS OF ACCOUNTS NUMBERS 3034504504 and 144-07143 at MERRILL, LYNCH, PIERCE, FENNER AND SMITH, INC./	:
	:
Defendants,	:

This case having come before the court on a motion filed by Plaintiff, The United States of America, to strike the claims of the shareholders of Friko Corporation ("Friko") and for the entry of the default judgment or, int he alternative, for final judgment against Friko ordering payment of the accounts to the U.S. Marshals and the court having reviewed the submissions of the parties without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure; and

it appearing that, on May 14, 1990, following the filing of a criminal indictment in this district alleging a complex international money laundering scheme, the government filed an amended complaint for civil forfeiture in rem against accounts 3034 504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith

("Merrill Lynch") in the name of Friko Corporation[1]; and

it appearing that a seizure warrant for the arrest of account 144-07143 was subsequently served on the broker for the account in the United States District Court for the Southern District of New York, where both accounts were located[2]; and

it appearing that, after Friko filed a claim to the res, this court found that it had personal jurisdiction over Friko and in rem jurisdiction over the res and that Friko lacked standing to file a claim because it had no cognizable interest in the res in that it was merely a shell corporation for its president, Johnny Daccarett, who was precluded from filing a claim on account of his status as a fugitive; and

it appearing that this court accordingly struck Friko's claim and entered default judgment against both Friko and the res awarding the contents of the accounts to the government; and

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Thorough recitations of the facts of this case can be found in this court's opinion of April 5, 1991 and in the opinion of the United States Court of Appeals for the Third Circuit in United States v. Contents of Accounts, 971 F. 2d 974 (3d Cir, 1992).

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At that time, account number 3034504504 had already been arrested in the Southern District of New York. The government then provided reasonable notice of the seizure.

it appearing that, on appeal, the United States court of Appeals for the Third Circuit affirmed this court's striking of Friko's claims and entering of default judgment against it, but concluded that this court lacked *in rem* jurisdiction over the res because it was arrested outside the territorial jurisdiction of this court and, accordingly, vacated that portion of this court's order sounding *in rem*, Contents of Accounts, 971 F. 2d 974 (3d Cir. 1992); and

it appearing that the Court of Appeals then remanded the case to this court for consideration of Friko's 60(b) motion to set aside the in personam judgment against it, id.; and

it appearing that, following the issuance of the Court of Appeal's opinion, Congress amended 28 U.S.C. § 1355 to provide for nationwide service of process in *in rem* forfeiture actions such as the case at bar, 28 U.S.C. § 1355(d); and

it appearing that, soon thereafter, on November 10, 1992, the government re-arrested the accounts in New York and published notice; and

it appearing that, on December 22, 1992, Friko filed a second claim on the *res*; and

it appearing that, on remand, this court denied Friko's motion to set aside the judgment striking its claims; and

it appearing that, on January 22, 1996, six claims were filed on the *res* by members of the Daccarett family claiming an interest in the accounts by virtue of their being

Friko shareholders; and

it appearing that, on June 12, 1996, this court's denial of Friko's Rule 60(b) motion was affirmed by the Court of Appeals; and

it appearing that, on September 11, 1996, this court entered an order on the mandate evidencing the affirmance of the denial of Friko's 60(b) motion and, on October 7, 1996, granted the government permission to file the instant motion; and

it appearing that the government now asks that the claims filed by Friko and its shareholders be stricken and that default judgment *in rem* be granted to the government; and

it being the opinion of the court that, because the amended complaint in rem in the case at bar was never formally dismissed and procedural and jurisdictional statutes may be applied retroactively when they do not affect an individual's substantive rights, See Salazar-Haro v. I.N.S., 95 F. 3d 309, 310 (3d Cir. 1996); Scheiderman v. I.N.S., 83 F. 3d 1517, 1522 (3d Cir. 1996), the re-arrest of the accounts after the effective date of the amended section 1355, providing for nationwide service of process, enables this court to exercise *in rem* jurisdiction over the accounts[3]; and

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Contrary to he government's analysis, because this action was pending at the time the statutory amendment became effective, its

it being the opinion of the court that, because Friko has already been determined to have no cognizable interest in the accounts at issue, the claim filed by Friko and the six claims filed by members of the Daccarett family asserting ownership in the accounts by virtue of their status as Friko shareholders, will be stricken[4]; and

it appearing that, no viable claims having been filed against the accounts, the entry of default judgment in favor of the

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application to the case at bar depends upon that statute's retroactivity. This is a question on which those circuits that have addressed the issue disagree. Compare United States v. 51 Pieces of Real Property in Roswell New Mexico, 17 F 3d 1306, 1312 (10th Cir. 1994) (holding that amendments to §1355 are not retroactive) with United States v. One 1978 Piper Cherokee Aircraft, 91 F 3d 1204, 1207 (9th Cir. 1996) (applying amendments to §1355 retroactively). Although this court has concerns over the Ninth Circuit's apparent conflation of the venue and jurisdictional issues, the court is convinced that the Ninth Circuit's approach to the retroactivity issue is more in keeping with Third Circuit precedent concerning retroactivity. See Salazar-Haro, 95 F 3d at 310; Scheidermann, 83 F. 3d at 1522. Significantly, claimants in the case at bar have not challenged the propriety of the service of process and notice or this court's jurisdiction over the *res*.

[4] Moreover, the six claims filed by the shareholders were untimely in the extreme. See Supplemental rule C (6) of the federal Rules of Civil Procedure (requiring that claims be filed 10 days after process is executed).

government is warranted;

IT IS on this 12th day of August, 1997,

ORDERED that the government's motion for default judgment be and hereby is granted.

_____/s/_____
MARYANNE TRUMP BARRY
U.S.D.J

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, *Plaintiff,*	Civil Action No. 901262 (MTB)
CONTENTS OF ACCOUNT NUMBERS 3034504504 and 144-07143 at MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., *Defendant.*	OPINION

BARRY, District Judge

I. INTRODUCTION

The United States filed a complaint in this civil forfeiture action on March 29, 1990, and an amended complaint on May 14, 1990. A warrant for the arrest of the defendant, the contents of account number 144-07143, held at Merrill, Lynch, Pierce, Fenner & Smith, 2 Broadway, New York, M.Y., was subsequently issued and arrest of the account was effectuated on June 29, 1990.[1] In its amended complaint, the

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[1] *See* Return of Service of Process, June 20, 1990, Docket Item No 9. Account number 144-07143 is a brokerage account. The complaint as originally filed only named account number 303454504 as a defendant. Account 3034504504 is actually a credit card account associated with the underlying brokerage account. Separate warrants

United States alleges that the account is subject to forfeiture pursuant the provisions of 18 U.S.C. §981, which *inter alia*, renders forfeit "any [personal] property . . . involved in a transaction or attempted transaction in violation of [31 U.S.C.] section 5313(a) [requiring, under its attendant regulations, financial reports on currency transactions in excess of $10,000] or [31 U.S.C. section] 5324 [prohibiting the structuring of deposits so as to avoid filing a financial report as required by 31 U.S.C. §5313(a)]or of [18 U.S.C. §1956] or [18 U.S.C. 1957] [money laundering offenses]". *See* 18 U.S.C. §981(a)(1)(A).[2] In essence, the

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for the arrest of account 3034504504 were issued on February 7, 1990 and on May 14, 1990. *See* Affidavit of Neil R. Gallagher, sworn to September 9, 1990 (hereinafter "Gallagher Aff.I") at ¶¶2; *See also* Defendant's Brief of October 9, 1990 at Exh. D; *See also* Return of Service or Process, May 14, 1990, Docket Item no. 6. Although effective as to both "accounts", I will, for the sake of clarity, refer to account 144-07143 as the sole defendant.

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18 U.S.C. §981 provides, in pertinent part:

> (a)(1) Except as provided in paragraph (2) [relating to "innocent owners"], the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. . . .

See 18 U.S.C. §981(a)(1).

31 U.S.C. §5313(a), as referenced in 18 U.S.C. §981 provides, in pertinent part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution...shall file a report on the transaction at the time and in the way the Secretary prescribes...

Pursuant to 31 C.F.R. §103.22(a)(1), the Secretary of the Treasury requires financial reports on transactions over $10,000.00

31 U.S.C. §5324, as referenced in 18 U.S.C. 981, provides, in pertinent part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction-
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

United States alleges that the defendant account was used to facilitate a large and intricate money laundering scheme in which Columbian drug money was mailed to the United States, converted into money orders and checks, and deposited back into various drug-connected accounts both in the United States and abroad.

Legal title to the defendant account is held by Friko Corporation ("Friko"), a corporation organized under the laws of Panama, having its principal place of business in Columbia. *See* Affidavit of Robert Dunst, sworn to August 27, 1990 (hereinafteer "Dunst Aff. I") at ¶ 6, Exhs. C.D. Friko has filed a claim contesting the forfeiture of the account, and has moved to dismiss the complaint and vacate the seizure on jurisdictional and other grounds. The United States, in turn, has moved to strike Friko's claim under the fugitive disentitlement doctrine or, in the alternative, for lack of standing.

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* * *

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institution.

18 U.S.C. §1956 and 18 U.S.C 1957 as referenced in 18 U.S.C. §981, generally forbid the offense of money laundering.

For the reasons set forth below, Friko's motion to dismiss the complaint and vacate the seizure will be denied, and the motion of the United States to strike Friko's claim will be granted.

II. DISCUSSION

A civil forfeiture action is an *in rem* proceeding against a piece of property based on the legal fiction that the property itself is guilty of facilitating a related crime. *See generally, U.S. v. One 1982 Porsche 928*, 732 F. Supp. 447, 451 (S.D.N.Y. 1990). As the Supreme Court noted long ago in a similar context, "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient". *See Various Items v. United States*, 182 U.S. 577, 581 (1931).[3] Because it is the property which is the defendant, the guilt or innocence of the owner is generally considered to be irrelevant. *See* D. Smith, *Forfeiture*, p. 2-3; *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (*noting The Palmyra*, 12

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[3] *Various items* is also noted in D. Smith, *Prosecution and Defense of Forfeiture Cases* p. 2-3 (1991) [hereinafter cited as D. Smith, Forfeiture].

Wheat. 1, 14-15 (1827) (Story, J.)). Put somewhat differently, "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner simply being accidental". *See goldsmith-Grant Co. v. United States*, 254 U.S. 505, 513 (1921) (*noted in* D. Smith, *Forfeiture*, p. 2-3).

From the perspective of the government, an *in rem* action against a piece of property or system of accounts carries a distinct advantage over proceeding by way of an *in personam* action against a criminal defendant, inasmuch as the civil *in rem* action results, upon a lesser showing of proof, in the elimination of the underlying financial machinery of structured criminal activity and not merely the arrest and incarceration of the individuals who operate that structure. *See e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969) (senate Report on RICO) (*noted in* D. Smith, *Forfeitures*, p. 1-1).

The present civil action stems from a related criminal proceeding tried in this district before the Hon. Alfred J. Lechner, Jr. *See United States v. Cardona*, Crim. Action No. 90-69 (AJL). In that action, Friko and its President, Johnny Daccarett, as well as several other corporations and individuals, were charged, *inter alia*, with conspiracy to

violate money laundering and transaction reporting statutes. Johnny Daccarett did not appear in that proceeding, and is a fugitive. For its own part, Friko was dismissed as a defendant without prejudice.

After the United States filed its complaint, Friko filed a notice of claim, contesting the government's right to forfeiture.[4] As noted earlier, Friko now moves to dismiss the complaint and vacate the seizure, and alleges: *first*, that the Court lacks jurisdiction over the res, which is located outside of this district; *second*, that it would be violative of Friko's due process rights as a defendant-claimant for the Court to proceed against the property when it is located outside of this district; *third*, that the complaint fails to comply with the pleading requirements of the Supplemental Rules; and *fourth*, that the government, even assuming the existence of jurisdiction and the sufficiency of the complaint, has failed to show sufficient connection between the account and the underlying money

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[4] Procedurally, claims for civil forfeiture are governed by the Supplemental Rules For Certain Admiralty And Maritime Claims ("Supplemental Rules"), which are part of the Federal Rules of Civil Procedure. *See* 18 U.S.C. 981(b). *See also* Supplemental Rule A(2). Friko properly filed its claim pursuant to Supplemental Rule C(6).

laundering scheme so as to render the account forfeit. Each of these allegations will be addressed *seriatim*.

II(a). Motion to Dismiss For Lack of Jurisdiction

In moving to dismiss for lack of subject matter jurisdiction, Friko argues as an initial matter that the defendant account is not located as the government asserts, in New York, but is rather located in Panama, a country over which Friko asserts the jurisdiction of this court does not extend. *See* Friko Brief of June 24, 1990 at p.4. *See also* Affidavit of Alan Silver, sworn to June 25, 1990 (hereinafter "Silber Aff. I") at §§4,5. There is no need to address this issue however, as it is manifestly clear that the account is, in fact, located in New York. *See* Affidavit of Harry J. Lundgren, sworn to September 6, 1990 at §§ 2-5 and supporting documentation.

II(b). Motion To Dismiss On Due Process Grounds

In an argument which is closely related to its basic jurisdictional challenge, Friko argue in the alternative that, even if the property is located in New York, it would be improper for the Court to proceed with this *in rem* action on the ground that, historically, an action *in rem* could only be brought in the district in which

the res was located.[5] More particularly, Friko challenges the Court's assertion of jurisdiction over the res in New York as contravening the principles of due process set forth in the Fifth Amendment to the constitution of the United States. Friko bases this challenge on its understanding that it would be violative of its due process rights as a defendant-claimant to have to answer a forfeiture proceeding in a "foreign" district in which the property is not situated. *See* Friko Brief of October 9, 1990 at pp. 20-30.

Friko fails to recognize, however, that the district courts of the United States enjoy nationwide jurisdiction over suits brought under 18 U.S.C. § 981, provided that certain venue requirements are met, venue requirements which, it will be seen, adequately address Friko's due process concerns. Thus, as evidenced in the venue provisions set forth in 18 U.S.C. § 981, a proceeding for forfeiture may be brought in the "judicial district in which the defendant owning such property is found or in the judicial district in

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[5] The Supplemental Rules generally reflect this requirement. *See* Supplemental Rule C(2) ("[The complaint] shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action").

which the [related] criminal prosecution is brought". *See* 18 U.S.C § 981(h). In this case, jurisdiction is proper because the related criminal case was prosecuted in this district.

Moreover, and importantly in view of Friko's constitutional challenge, extra-territorial jurisdiction such as that exercised here has time and again been deemed to comply with the requirements of the Fifth Amendment, there being no violence to the principles of due process when an *in rem* action is brought in the same district as that in which the related criminal case has been tried. As one court succinctly noted in construing the identically worded venue provisions set forth in 21 U.S.C. § 881(j):

> (V)iolation of the [underlying criminal statute] occurred [in the district where the forfeiture was brought] and, therefore, anyone involved in the criminal act should reasonably expect to be subject to the exercise of jurisdiction in that district... The relationship between the defendant-claimant and the forum under (the venue statute) is a reasonable one within the meaning of the due process clause. *See Hanson v. Denckla* [357 U.S.235(1958)].

See U.S. v. Premises Known As Lots 50&51 Etc., 681 F.Supp. 309, 312 (E.D.N.C.

1988) (*held*: federal district court sitting in Eastern District of North Carolina has jurisdiction over property located in Southern District of Florida); *accord*, *U.S. v. Parcel I., Beginning at Stake*, 731 F.Supp. 1348 (S.D.Ill.1990) (*held*: federal district court sitting in Southern District of Illinois has jurisdiction over property located in Tennessee); *see also* D. Smith, *Forfeiture*, P. 9-33 ("... nor can there be any serious doubt about [section 881(j)'s] constitutionality").

I thus give little weight to Friko's jurisdictional arguments, and certainly will not dismiss the complaint on any purported jurisdictional ground. Moreover, to the extent that the Supplemental Rules generally governing these proceedings conflict with the later enacted and more detailed venue provisions of Section 981. I reject the Supplemental Rules. *See, e.g., U.S. v. Parcel I*, 731 F.Supp. at 1351.[6] *Cf.*

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[6] I similarly reject Friko's subsidiary arguments which derive any force they may have from its claim that the Court lacks jurisdiction over the res. Thus for example, Friko argues that service of process by the United States was defective because the res is outside the District of New Jersey, relying on Supplemental Rule E(3)(a) ("Process in rem...shall be served only within the district"). *See Parcel I*, 731 F.Supp at 1351 ("Since process is necessary to perfect

Supplemental Rule C(2), *supra*, note 5.

II(c). Motion To Strike The Claim of Friko Corporation

As indicated, legal title to the defendant account resides with Friko. In moving to dismiss Friko's claim, the United States asserts that Friko is not, in fact, a bona fide owner of the property, but is rather a straw man for the real party in interest, Johnny Daccarett,a fugitive. More particularly, the United States argues that it would be both improper and contrary to public policy for a fugitive to maintain or preserve property which would otherwise be subject to forfeiture by simply authorizing a corporation which he - dominates to enter the jurisdiction and assert the claim on the fugitive's behalf.

For the reasons set forth below, I find the government's argument both well grounded in law and compelling as a matter of common sense, and will, therefore, order the Friko's claim stricken.

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statutory jurisdiction, the claimant's argument [objecting to the `failure' to comply with Supplemental Rule E(3)(a)], if followed, would render § 881(j)[venue] a nullity. A statutory construction which would impute a useless act to Congress must be viewed as unsound and rejected". (citation omitted)).

As a preliminary matter, I note that it has long been settled that, pursuant to the "fugitive disentitlement doctrine", a fugitive may not invoke the power of the Court to preserve his or her property in a civil forfeiture action while at the same time flaunting the Court's criminal processes. *See, e.g., United States v. Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) In United states Currency*, 739 F.2d 792 (2nd Cir.1984); *U.S.v.One Parcel of Real Estate Dade County, Fla.*,868 F.2d 1214 (11th Cir.1989). Indeed, in such a situation, the fugitive is deemed to have waived his right to due process, *see United States v. Forty-Nine Thousand*, 739 F.2d at 798, and judgement may be entered in the government's favor as an uncontested matter. *See U.S. v. One Parcel*, 868 F.2d 771 (11th Cir. 1985) *held*: fugitive's claim properly dismissed as sanction pursuant to Fed.R.Civ.P.37(b) for twice failing to appear at a deposition; merits of the underlying claim irrelevant).

While generally not disputing the validity of the fugitive disentitlement doctrine, Friko asserts that it is not itself a fugitive and, therefore, that the doctrine is inapplicable to its claim. I am unpersuaded. The facts indicate that the only principal officers of Friko besides Johnny Daccarett, its president, are Jorge Daccarett and Joseph Daccarett, both

apparently members of Johnny Daccarett's family, who serve as Friko's secretary and treasurer, respectively. *See* Dunst Aff. I at ¶6, Exh. C. Johnny Daccarett alone signed the corporate resolution authorizing the legal representation of Friko in the criminal case then pending before Judge Lechner. *Id.* at ¶¶ 10, 11, Exhs, G, H. It is absolutely clear, at least to me, and that the corporation, which has tendered nothing which even suggests that it functions as a legitimate enterprise, is little more than a shell. In any event, Johnny Daccarett has thus far failed to appear to give any account of how the corporation functions, and it is thus impossible to ascertain that it is anything other than that which the government asserts, *i.e.* a holding organization for laundered money.[7]

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While it is not necessary to put the government to its proof, *see infra*, note 8, I note that the government has established substantial links between the defendant account and the money laundering scheme, as set forth in the complaint and subsequent documentation. Thus, for example, the United States has established that one Luis E. Saad received $41,000.00 from the defendant account, and that Saad was subsequently involved in a pervasive money laundering scheme. *See generally*, Dunst Aff. I at ¶¶ 9, 12-16. While Saad has indicated that he received this money to establish a textile business, *see* Affidavit of Luis E. Saad at ¶¶ 2-8, I am not prepared to accept this

Under these circumstances, I will not permit Friko's claim to stand. As one commentator suggests:

> The courts should nonetheless be ready to thwart efforts by the bailee/claimant to shield the owner from scrutiny. *Cf. The Schooner Adeline*, 13 U.S. (9 Cranch.) 244, 3 L.Ed. 719 (1815). In narcotics cases involving large cash seizures or other extremely valuable property, the true owner often attempts to conceal his identity and his interest in the property through various smoke-screens including straw owners and alter ego corporations. The claimant in such cases is usually a bailee, straw owner or alter ego corporation. Even if the claimant has standing to contest the forfeiture, this should not excuse the owner,

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explanation, inasmuch as Saad is himself a fugitive and an indicted co-conspirator of Friko. Under the circumstances, it would be entirely inappropriate to permit one fugitive conspirator to testify by way of affidavit in favor of another in order to establish the "legitimacy" of the transactions under scrutiny. Saad aside, I also note that Friko has not been able to explain the remaining substantial evidence linking the defendant account to the money laundering scheme. *See esp.* Dunst Aff. I at ¶ 14.

> who is the real party in interest, from searching inquiry by the government.

See D. Smith, *Forfeiture*, p. 9-58, n 22. Here, as indicated, the absence of Johnny Daccarett makes it impossible to subject him to "searching inquiry", and the only information known to the Court about the activities of Friko is that it is both a supplier and recipient of funds in a thus-far well documented laundering scheme. *See supra*, note 7.

Finally, I note that, as the government suggests, the same result is compelled under analogous principles relating to standing. It has long been settled in the law of forfeitures that it is the claimant's burden to demonstrate as a threshold matter actual ownership and control over the res, and not merely possession of legal title . *See e.g.*, *U.S. v. One 1982 Porsche 928*, 732 F. Supp. at 451 ("While ownership may be proven by actual possession, dominion, control, title and financial stake, `[t]he possession, of bare legal title to the *res* may be insufficient,' absent other evidence of control or dominion over the property", *citing*, *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, (Appeal 1), 604 F. 2d 27, 28-29 (8th Cir. 1979); *United States v. One 1945 Douglas D-54 (DC-4) Aircraft*, (Appeal 2), 647 F. 2d 864, 866 (8th Cir. 1981); *United States v. One 1977 36 Foot*

Cigarette Ocean Racer, 624 F. Supp. 290, 294-295 (S.D. Fla. 1985)). Friko Has produced nothing of substance to establish that it held anything more than legal title to the account, and has thus failed to demonstrate that it has standing to contest the forfeiture. Accordingly, its claim will be stricken.[8]

III. CONCLUSION

For the reasons set forth above, Friko's motion to dismiss the complaint on jurisdictional and other grounds will be denied, and the motion of the United States to strike Friko's claim under the fugitive disentitlement doctrine or, in

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[8] Given this disposition, I need not reach Friko's arguments that the government has not pled the facts of its case with sufficient specificity and that the government has not established a sufficient connection between the account and the associated money-laundering scheme so as to render the account forfeit. *See generally*, D. Smith, *Forfeiture*, pp. 9-55 - 9-56 ("Unless a claimant can first establish his standing he has no right to put the government that it is subject to forfeiture if the only claimant is unable or unwilling to provide evidence supporting his assertion of an interest in the property." (citations omitted)).

the alternative, for lack of standing, will be granted.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: April 5, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5470 & 91-5768

UNITED STATES OF AMERICA

v.

CONTENTS OF ACCOUNTS NOS. 3034504504 AND 144-07143
AT MERRILL, LYNCH, PIERCE, FENNER AND SMITH, INC.

FRIKO CORPORATION,
Claimant

FRIKO CORPORATION,
Appellant

SUR PETITION FOR PANEL REHEARING

PRESENT: SLOVITER, *Chief Judge*, MANSMANN AND HUTCHINSON,
Circuit Judges

The petition for panel rehearing filed by Friko Corporation in the above captioned matter having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing he denied.

By the court,

/s/ William D. Hutchinson
Circuit Judge

Dated: September 22, 1992

Filed July 22, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5470 & 91-5768

UNITED STATES OF AMERICA

v.

CONTENTS OF ACCOUNTS NOS. 3034504504
AND 144-07143 AT MERRILL, LYNCH, PIERCE, AND
SMITH, INC.

FRIKO CORPORATION,

Claimant

FRIKO CORPORATION,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 90-01262)

Submitted Under Third Circuit 12(6)

January 31, 1992

PRESENT: SLOVITER, *Chief Judge*, MANSMANN, and
HUTCHINSON, *Circuit Judges*

(Filed July 22, 1992)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

These *in rem* forfeiture proceedings involve two accounts opened with Merrill, Lynch, Pierce Fenner & Smith in the name of Friko Corporation (Friko), a Panamanian corporation. At Docket No. 91-5470 Friko appeals an order of the United States District Court for the District of New Jersey that struck its claim to those accounts. The district court struck Friko's claim after holding Friko lacked standing to contest the seizure. Not only does Friko contend that it had standing, it also contends that the district court lacked jurisdiction to entertain the forfeiture proceeding because the accounts were not located in the same district in which the *in rem* forfeiture was filed. At

Docket No 91-5768 Friko also appeals from a subsequent order of the district court denying, as untimely, Friko's motion for reargument of the order striking its claim to the *res*.

Preliminarily, after examining the district court's jurisdiction, we hold that court had jurisdiction over the dispute between the government and Friko and that venue was properly laid in New Jersey. We also hold, however, that the district court lacked jurisdiction to determine the government's rights to the *res* versus the rest of the world. On the merits, we hold that the district court, on the evidence before it, did not err in ruling that Friko is nothing more than a straw man, or alter ego, for Johnny Daccarett (Daccarett), the true owner of the accounts. Thus, the district court was correct in concluding that Friko did not have standing to object to the forfeiture. Accordingly, on Friko's appeal No. 91-5470 we will affirm the orders of the district court striking Friko's claim for lack of standing and its consequent order entering a default judgment against Friko, but vacate its order entering a default judgment in favor of the government as to the *res* itself.

Finally, we have concluded that Friko's motion for reargument is properly treated as a motion for relief under Federal Rule of Civil Procedure 60(b) rather than Rule 59(e). As such, we hold it was timely. Thus, on Friko's

appeal at No 91-5768 we will remand the case to the district court so that it can exercise its discretion to grant or deny that motion.

I.

Following a criminal indictment filed in the United States District Court for the District of New Jersey alleging money laundering against, *inter alia*, Julio Montes Cardona (Cardona), Daccarett, Friko, and Quasil International Corporation (Quasil), the government filed an amended complaint for civil forfeiture *in rem* against Friko's accounts 3034504504 (the credit card account) and 144-07143 (the brokerage account) (collectively "the accounts") at Merrill, Lynch, Pierce, Fenner & Smith (the broker) in New York, New York on May 14, 1990 in the United States District Court for the District of New Jersey. A seizure warrant for the arrest of the brokerage account was then served on the broker in the United States District Court for the Southern District of New York. The credit card account had already been arrested.

Friko filed an objection to the forfeiture of the seized property on June 7, 1990. Thereafter, it seized property on June 7, 1990. Thereafter, it filed a motion to dismiss the amended complaint on numerous grounds including lack of *in rem* jurisdiction. On August 31, 1990, the government moved to strike Friko's claim on the ground that Friko

had no standing to object to the forfeiture because it was just a straw man for the true claimant, its president Johnny Daccarett, who did not have standing because he is a fugitive.

In an opinion and judgment entered on April 8, 1991, the district court denied Friko's motion to dismiss and granted the government's motion to strike Friko's claim. The district court held that it had jurisdiction over the forfeiture proceeding because Friko and Daccarett had been indicted in *United States v. Cardona*, No. 90-69 (D.N.J.), a related criminal case. The district court struck Friko's claim for lack of standing after concluding that Friko, as a straw man for the true claimant, Daccarett, had no standing and held that Daccarett himself was not entitled to challenge the seizure because he was a fugitive. The government then moved for an order that Friko had defaulted by failing to assert any cognizable right in the *res*. That motion was granted on April 19, 1991. Subsequently, a default judgment which awarded the *res* to the government was entered on the forfeiture complaint on May 24, 1991.

Unaware that a default judgment had been entered awarding the government full ownership of the *res*, *see infra* note 10, Friko filed a motion for reargument on the order striking its claim to the *res*. The motion for reargument was filed the day the default

judgment awarding the *res* to the government was entered. It was returned to Friko's attorneys because they had failed to set forth a return date for the motion.

On may 31, 1991, Friko filed a proper motion for reargument on the order striking its claim. In its renewed motion for reargument. Friko also asked that the April 19, 1991 default order entered due to its failure to assert a cognizable right in the *res* be vacated. In addition, on the same day, May 31, 1991, Friko filed a timely notice of appeal from the order striking its claim. As stated we docketed that appeal at No. 91-5470.[1] The government

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1 Even though the notice of appeal in No.. 91-5470 was filed at the same time the motion for reargument was filed, we have appellate jurisdiction over that appeal. If the district court correctly framed the motion for reargument of the April 8 order as a motion made under Federal Rule of Civil Procedure 59(e), that motion was untimely, void and of no effect on the simultaneously filed notice of appeal in No. 91-5470. *See* Fed. R. App. P 4(a)4; *In re Bankers Trust Co.*, 752 F. 2d 874, 880 n.7 (3d Cir. 1984). If, on the other hand, the motion for reargument is a Rule 60(b) motin, our appellate jurisdiction is equally unaffected. Rule 60 motions do not affect pending notices of appeal. *See* Fed. R. App. 4(a)(4); *Bankers Trust Co.*, 752 F.2d at 880 n.7. We consider this issue *infra*, Part VI, typescript at 33-37.

opposed the motion for reargument. On July 31, 1991 the district court denied the motion for reargument as an untimely Rule 59(e) motion for reconsideration, and refused to set aside the default, On September 24, 1991, Friko filed its second notice of appeal, docketed at No 91-5768, from both the April 8 order and the July 31 denial of reconsideration.

II.

Forfeiture is part of the government's efforts to halt money laundering by drug dealers in the United States. According to the government, after drug dealers in the United States with supplier in South America collect the cash proceeds of their illicit sales they face the problem of transferring money back to South America to pay the suppliers. Our federal banking laws are structured to minimize the use of our banking system to channel these illegal cash proceeds to South America.

Accordingly, any time a financial institution is involved in an all cash transaction that exceeds an amount specified by a banking regulation, it must be reported by the financial institution involved. *See* 31 U.S.C.A. § 5313 (West 1983). Current regulations require cash transactions exceeding $10,000.00 to be reported. *See* 31 C.F.R. §103.22(a)(1) (1991). If the reporting requirement is not observed, criminal penalties are imposed. 31 U.S.C.A. § 5322 (West Supp. 1922). It

is also illegal to structure transactions intentionally to avoid the financial institution's reporting requirement. *Id.* §5324 (West Supp. 1992). Thus, systematic cash deposits in an amount less than $10,000.00 that are made for the purpose of avoiding section 5313's bank reporting requirement subjects the depositor to that section's criminal penalties. Purchasing money orders and then depositing the money orders in a bank account in order to avoid the section 5313 reporting requirement also subjects the depositor to section 5324's penalties.

Friko was formed in September of 1980. Its principal directors and corporate officers were all members of the Daccarett family. Jorge Daccarett, Friko's Secretary, has signed an authorization that allows Johnny and Delia Daccarett to obligate the company. Friko opened the accounts in question in Panama in October of 1983 and believed them to be located there. In fact, the brokerage account is held in New York, while certain free credit balances are held in the United Kingdom.[2]

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2 The parties do not tell us how these free credit balances arose, the nature of the rights they evidence or the persons entitled to those rights. In any event, the "free credit balances," like the accounts, are not located in New Jersey. If they are located in the United

The indictment charged that Cardona ran a money laundering operation in New Jersey and that Friko, Daccarett and Quasil, a Panamanian company owned by Daccarett and Quasil, a Panamanian company owned by Daccarett, *inter alia*, participated in that operation. The investigation uncovered evidence that substantial sums passed between the accounts of Quasil and Friko. Quasil's Florida accounts show deposits from the Cardona money laundering operation of 351 money orders of small denominations totaling $224,000.00 over an eight-month period, many of which were sequentially numbered. Moreover, a $41,000.00 check from Friko's brokerage account was used to open a New York savings account by Luis Saad, who also had dealings with the Cardona operation and another Quasil account in Panama. The government states that its investigation has not uncovered any business activities for Friko or Quasil except for a series of transactions in various bank accounts on which they are shown as holders of legal title.

Friko "present[s] itself as a money exchanger in Colombia[`s] parallel market." Brief of Appellant in No. 91-5470 at 6. In support it presented an

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Kingdom, we leave to the district court any question concerning its subject matter jurisdiction over them. The district court's subject matter jurisdiction over the accounts themselves is dealt with in footnote 4, *infra*.

affidavit of Mohammad Haris Jafri, an economist formerly with the international Money Fund. Jafri stated that south American businesses frequently hold dollars in American banks as a hedge against the volatility of South American currencies. Saad also filed an affidavit on Friko's behalf. He stated that he worked for his father's textile business and went regularly to New York to buy textiles. Saad says he had no cash to buy the textiles because his money was all tied up in certificates of deposit, when Daccarett, a friend of Saad's father, helped him out by giving him $41,000.00 for the purpose of buying textiles. The $41,000.00 was Saad's initial deposit in his New York account. Saad said he has repaid Daccarett.

Friko and Daccarett were named as defendants in the Cardona indictment. While Daccarett himself did not enter an appearance, he signed a corporate resolution that authorized an appearance for Friko as a defendant in the Cardona criminal case. The government subsequently chose to dismiss Friko from the criminal case on October 19, 1990 but continued to proceed on its civil forfeiture action against the accounts Friko claims its owns. At the time the accounts were seized, Friko says they had a balance totaling more than $1,700,000.00.

After the district court held that Friko was a straw man for Daccarett and struck its claim, Friko, in support of

its motion for reargument, submitted an affidavit from Isidoro Rodriguez (Rodriguez), a member of the Virginia bar as well as Friko's lawyer in Colombia. Rodriguez stated that Daccarett is the "Legal Representative" for two of Colombia's one-hundred largest exporters and that the combined transactions of these two exporters totaled over $9,000,000.00 in the first half of 1990. Rodriguez also swore that Friko was formed to help facilitate these transactions and that Friko's initial capitalization came from the sale of another Daccarett-family-owned business.
Finally, he represented that Friko "is capable of presenting documentation to establish its legal and equitable interest in the property seized." Supplemental Appendix in No. 91-5768 at 126.

III.

We have appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C.A § 1291 (West Supp.. 1991).[3] Friko disputes the

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Both parties cite *McKay v. Heyison*, 614 F.2d 899, 903 (3d Cir. 1980) for the proposition that the denial of a motion to intervene as of right is final and appealable. *Id.* Thus, both parties liken the claim procedure in forfeiture to intervention. We accept this analogy since the government proceeds against the res in a

district court's jurisdiction over the accounts the government seeks forfeiture of. The resolution of this dispute will determine whether the district court had the power to decide if Friko had any claim to the accounts and whether they were forfeited to the government.

IV.

We must first address several threshold questions concerning subject-matter jurisdiction, due process, venue, *in rem* jurisdiction and service of process. We will consider them in turn before reaching Friko's arguments that it had standing to contest the forfeiture and that its motion for reargument was erroneously denied.

A

Friko frames its venue argument in terms of due process, arguing that "[a]though federal courts have nationwide jurisdiction, due process demands at least *some* connection to the District"[4] Brief for Appellant in No.

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forfeiture proceeding and any claimants to that res assert their claims by intervening in the action. *See* David B. Smith, *Defense and Prosecution of Forfeiture Cases*, ¶ 9.04,at 9-58.1 to 9-58.2 (1985 & Supp. 1991).

4

Friko's arguments appears, at times, to go to the district court's subject-matter

91-5470 at 24 (emphasis in original). Friko says that the Supplemental Rules For Certain Admiralty And Maritime Claims (Supplemental Rule(s)) set forth the minimal requirements for a connection that is sufficient to meet due process standards in proceedings *in rem*.[5] Supplemental Rule C(2) provides in relevant part:

> In actions in rem the complaint shall be verified on oath or solemn affirmation. *It shall describe* with reasonable particularity *the property* that is the subject of the action *and state*

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jurisdiction as well as to territorial jurisdiction. To the extent that it goes to subject-matter jurisdiction, we summarily reject it. Congress has given the district courts nationwide subject-matter jurisdiction over civil forfeiture cases like this. *See e.g.*, 28 U.S.C.A. § 1345 (West 1976) (district courts have jurisdiction over civil suits commenced by United States unless otherwise noted); 28 U.S.C.A. § 1355 (West Supp. 1992) (district courts have jurisdiction over any forfeiture under an Act of Congress).

5

The admiralty and maritime rules provide "[t]hese rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not." Supp. R. For Certain And Maritime claims A.

> *that it is within the district or will be during the pendency of the action.*

Supp. R. E(3)(a) (emphasis added). Both rules presuppose that the re is located in the district where the action is commenced. Friko, therefore, argues that the District of New Jersey lacked venue over this *in rem* action for forfeiture because the res was in the Southern District of New York and 18 U.S.C.A. § 981(h) (West Supp. 1992), concerning venue in forfeiture cases, is unconstitutional. This question is one of law over which we exercise plenary review. *See Air Courier Conf. Of Am./Int'l Comm. v. United States Postal Serv.* 959 F.2d 1213, 1217 (3d Cir. 1992)

Section 981(h) reads:

> In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section may be brought in the judicial district in which the criminal prosecution is brought.

Id. § 981(h). Here, Friko was indicted as a co-defendant in the Cardona criminal prosecution in the District of New Jersey. The government, therefore, contends that a proceeding to forfeit Friko's bank accounts can be brought in

the District of New Jersey under section 981(h).

Section 981(h) is recently enacted and we have found only two reported cases that have even mentioned it. *See United States v. All Funds On Deposit In Any Account At Certain Fin. Insts. Held In The Names Of certain Individuals*, 767 F. Supp. 36, 39-40 (E.D.N.Y. 1991); *United States v. Contents of Account Number 11671-8*, 763 F. Supp. 53,54 (S.D.N.Y. 1991). Neither deals with the due process question Friko raises and neither undertakes any materially helpful discussion or analysis of section 981(h). They do no more than provide examples of situations in which section 981(h) afforded a district court venue over civil forfeiture actions against a *res* outside the district when the forfeiture action was related to criminal proceedings brought within the district. *See All Funds*, 767 F. Supp. at 39-40 (venue over forfeiture proceedings concerning four accounts located in the Southern District of New York properly laid in the Eastern District of New York); *Account Number 11671-8*, 763 F. Supp. at 54 (venue over proceedings concerning account located in District of Puerto Rico properly laid in the Southern District of New York).

Section 981(h) is, however, a veritable clone of 21 U.S.C.A. § 881(j) (West Supp. 1992) (forfeiture proceedings related to drug

prosecutions).[6] Section 881(j) has been the subject of eight reported cases. Only in one, *United States v. 11205 McPherson Lane*, 754 F. Supp. 1483, 1484-89 (D-Nev. 1991) has a court held that section 881(j) did not give it power to deal with a *res* located outside the district in which the forfeiture proceeding was brought, and there the court pointed out the problem was not venue but territorial jurisdiction. *Cf. United States v. 6960 Miraflores Ave.*, 932 F.2d 1433, 1435 (11th Cir. 1991) (government may prosecute "forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found"), *petition for cert. Granted sub. Nom, Republic Nat'l Bank v. United States* , 112 S. Ct. 1159 (1992) (certiorari granted on an

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6 *Compare* 18 U.S.C.A. § 981(h), *supra* typescript at 13, *with* 21 U.S.C.A. § 881(j):

> In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for the forfeiture of the property under this section may be brought in the judicial district in which the defendant owning such property is found of in the judicial district in which the criminal prosecution is brought.

unrelated issue); *United States v. Maull*, 855 F.2d 514,517 (8th Cir. 1988) (forfeiture prosecution may be brought either where *res* is located or criminal prosecution is brought); *United States v. 218 Panther St.*, 745 F. Supp. 118, 119 n.2 (E.D.N.Y. 1990) (noting statute in dicta), *aff'd sub nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991); *United States v. Section 28, Block 1, Lot 48,221*, 131 F.R.D. 27,28 (D.R.I. 1990) (claimant's motion for transfer or forfeiture proceedings to Southern District of New York granted when indictment had been transferred there and *res* was there); *United States v. Parcel I* , 731 F. Supp. 1348, 1351 (S.D.Ill. 1990) (forfeiture proper when brought in same district as related criminal proceeding); *United States v. 5708 Beacon Dr.*, 712 F. Supp. 525, 527 (S.D. Miss. 1988) (same); *United States v. 2050 Brickwell Ave.*, 681 F. Supp. 309, 311 (E.D.N.C. 1988) (same).

These cases persuade us to reject Friko's argument that section 981(h)'s limited grant of venue over civil actions for forfeiture of a *res* to district courts that do not have the *res* within their boundaries violates due process. By limiting venue in civil forfeiture proceedings to those districts that have venue over a related criminal proceeding, section 981(h) prevents the government from seeking civil forfeiture in a court so

inconvenient for the defendant or the claimant that either of them is deprived of the fundamental fairness that is at the core of due process. Section 981(h) assures that the criminal defendant whose alleged misconduct is the basis on which the government asserts its right to forfeiture will already be present or subject to personal jurisdiction in the forfeiture venue because it is only there that the related criminal action can proceed (other than where the *res* is or its owner is found). Since venue in a criminal proceeding is constitutionally restricted to "the state where the said crimes shall have been committed," U.S. Const. Art. III, § 2, cl. 3, civil forfeiture venue under section 981(h) is similarly restricted to a district in the state where the related crime was committed. We therefore hold that the district court's assumption of venue under section 981(h) does not infringe Friko's constitutional right to due process.

B.

Friko's argument also goes to the absence of *in rem* (territorial) jurisdiction over the *res*, as well as the court's lack of power to hear the government's cause because of a lack of venue. Friko contends that the district court was without territorial jurisdiction because the *res* was not located in the District of New Jersey. The district court ruled that territorial jurisdiction existed in the

District of New Jersey under section 981(h). Friko's challenge to the district court's assertion of territorial jurisdiction is a question of law over which we exercise plenary review. *See Bumberger v. Insurance Co. of N. Am*, 952 F.2d 764, 766 (3d Cir. 1991).

The government asserts "[t]here is no doubt that in the territorial jurisdiction of the United States District Court of New Jersey in a forfeiture proceeding includes New York City. Its jurisdiction is limited only by the nation's borders and the venue provisions. Congress created nationwide jurisdiction when it passed 18 U.S.C. § 981(h) ..." Brief for Appellee in No. 90-5470 at 27-28 (citation omitted); *see* 18 U.S.C.A. § 981(a)(1)(A) (West Supp. 1992).

Friko's jurisdictional argument is not controlled by section 981(h)'s validity as a venue statute. Venue, though dependent upon jurisdiction, is distinct from it.

> Venue does not refer to jurisdiction at all. "Jurisdiction" of the court means the inherent power to decide a case, whereas "venue" designates the particular [district] in which a court with jurisdiction may hear and determine the case.

Black's Law Dictionary 1396 (5th ed.1981) *See generally* 4 Charles A. Wright,

Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 1070 (2d ed. 1984) (discussing *in rem* jurisdiction). The government's premise, that section 981(h) automatically expanded the district court's *in rem* jurisdiction to the same extend as its venue, must be examined.

When subject-matter jurisdiction an d venue are present but the *res* that is said to afford a district court *in rem* jurisdiction is located outside the district in which proceedings against the *res* are brought, service of process must be available if a district court is to exercise jurisdiction over the *res*. *See The Rio Grande*, 90 U.S. (23 Wall.) 458, 463 (1874). In this case, the *res* is in New York, not New Jersey, and the Supplemental Rules on which service of process depends provide for service only within the district in which the court seeking to exercise power over a *res* is located. *See* Supp. R. E(3).

The Federal Rules of Civil Procedure allow process to "be served anywhere within the territorial limits of the state in which the district court is [located]," unless a federal statute authorizes otherwise, subject to an exception not relevant here. Fed. R. Civ. P. 4(f). They also allow service under any statute of the state within which the district court sits. Id. 4(e). The government has made no contention, however, that any New Jersey statute applies in this case. Thus, without

federal statutory authorization, the district court cannot serve process on any *res* located outside of New Jersey. For that authorization, the government turns again to section 981(h).

As we have explained, section 981(h) gives venue to a district court that does not have the *res* within its boundaries when a related criminal prosecution is brought within the district. It is silent with respect to service of process, as is 21 U.S.C.A. § 881(j), the model for section 981(h). Despite section 981(h)'s silence on the subject of service of process, the government says that it authorizes extra-territorial jurisdiction as well as venue over a *res* outside a district's boundaries. In order to do so, the government seeks to imply a provision for a nationwide service of process into section 981(h). The government concedes that section 981(h) has no legislative history but asks us to look its first born twin, section 881(j). Curiously, the government also concedes the absence of relevant legislative history for section 881(j) and instead finally asks us to look to the legislative history of 21 U.S.C.A. § 853 (West Supp. 1992).

There in the history of section 853, the government discovers part of a Senate Committee report that it says supports its argument that section 981(h) implicitly provides territorial jurisdiction over civil forfeiture proceedings *in rem* beyond the district in which the *res* is located. The history the government refers to reads:

A third major problem with current forfeiture statutes arises from the need to pursue virtually all forfeitures of drug-related property through civil proceedings. Until recently, civil forfeiture proceedings under title 21 were not perceived as particularly problematic. Indeed, in certain respects, civil forfeiture has advantages over criminal forfeiture. As noted above, property is generally seized early on in a civil forfeiture case, thus limiting the problem of transfers and concealment of assets. Also, the government's burden of proof is lower in these cases. However, as drug trafficking has increased and the government has stepped up its enforcement and forfeiture efforts, the backlog of civil forfeiture cases in some parts of the country has become unmanageable. A way of relieving this problem would be to allow Federal prosecutors, in appropriate circumstances, to pursue criminal, rather than civil, forfeitures in drug cases. The problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a separate civil suit. And where the property of a defendant, or defendants, in the criminal case is located in more than one

judicial district, a separate civil forfeiture suit must be filed in each of these districts.

A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture. In cases where this alternative could be pursued, valuable judicial and law enforcement resources could be saves.

S. Rep. No. 225, 98th Cong., 2d Sess. 196-97, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3379-80.

The Supreme Court of the United States appears increasingly reluctant to rely on legislative history even more on point than that which the government cites here. *See* Stephen Breyer, *On the Uses of Legislative history in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 846 (1992). It also seems to be especially reluctant to imply provisions that are ordinarily expressly stated into statutes that do not mention them. *See, e.g, Suter v. Artist M.*, 112 S. Ct. 1360 (1992). Here, the only legislative history the government has supplied comes from a different statute and it is easily and naturally read as relying on an alternate procedure to

meet the problem that implication of a service of process provision into section 981(h) would solve. The statute's silence puts the government in an embarrassing position somewhat akin to that of Dr. Watson when he, unlike Sherlock Holmes, failed to see any significance in a dog's failure to bark. *See* Sir Arthur Conan Doyle, *The Hound of the Baskervilles, reprinted in 2 The Complete Sherlock Holmes* (Doubleday & Co. 1930).

Section 853 deals with criminal forfeitures. *See* 21 U.S.C.A. §853. Our case is one for civil forfeiture. *See* 18 U.S.C.A. § 981. On its face, this excerpt from the legislative history of section 853 that the government relies on indicates that Congress recognized a problem in asserting extra-territorial jurisdiction over *in rem* civil forfeitures but nevertheless decided not to extend service of civil process beyond the district in which the *res* is found, choosing instead to deal with the problem through the alternate procedure of criminal forfeiture. The legislative history the government cites does not support its argument with respect to extra-territorial *in rem* jurisdiction over civil forfeitures.

In any event, we think the teaching of the Supreme Court precludes us from implying a provision for extra-territorial service of process into section 981(h). It has stated:

> It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress has failed to do so [] argues forcefully that such authorization was not its intention.

Omni Capital, Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987). *Omni Capital* held that a provision for nationwide service of process could not be implied into Section 22 of the Commodities Exchange Act. *Id.* at 107-08.

We recognize that in *Omni* the Court was influenced by the fact that other sections of the Commodities Exchange Act did authorize nationwide service of process. *Id. at 104-08.* Thus, *Omni Capital* may be distinguishable on its facts since the civil forfeiture laws contain no sections that provide explicitly for nationwide service of process. We do not think this distinction is controlling. In may other contexts, the utility of a nation wide service of process provision has not been lost on Congress. Aside from the Commodities Exchange Act, Congress has expressly provided for nation wide service of process in the civil Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C.A. § 1965(b) (West 1984), the Securities Act of 1933, *see* 15 U.S.C.A. §77v(a) (West Supp. 1992), the Securities Exchange Act of 1934, 15 U.S.C.A. § 78aa (West Supp.

1992), and the Employee Retirement Income Security Act, *see* 29 U.S.C.A. § 1132(e)(2) (West 1985). *See 11205 McPherson Lane*, 754 F. Supp. at 1488; *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1220 n.14 (1992) (noting nationwide service of process provided for in Arbitration Act, 9 U.S.C.A. § 9 (West 1970) and Sherman Act, 15 U.S.C.A. § 5 (West 1973)); Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. Rev. 1117, 1123 n.30 (1989) (listing another twelve nationwide statutes providing for nationwide service of process). In the absence of clear evidence in the legislative history that Congress intended to allow nationwide service of process when it enacted section 981(h), we do not think we can imply authorization for nationwide service from section 981(h)'s liberalized rule on venue.

We might be more inclined to imply into section 981(h) a provision for nationwide service of process if, without the extended venue it provides for, civil forfeitures would lose all practical effect, but that is not the case. Without section 981(h), "[a] civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found," 28 U.S.C.A. § 1395(b) (West 1976).

Absent section 981(h), the District of new Jersey would be an improper venue for civil forfeiture of a *res* even as to the defendants in the related criminal action. Again, we remind the reader that Section 981(h)'s grant of venue to a district court in which a relat3ed criminal proceeding has been brought permits the District Court of New Jersey to adjudicate any rights the criminal defendants subject to its jurisdiction may have in a *res* located in New York, or elsewhere, without regard to service of process. *See* 18 U.S.C.A. § 981(h). Whenever a criminal case is pending in the district where the related civil forfeiture is brought pursuant to section 981(h),a criminal defendant who has a claim to the *res* will usually be within the district court's *in personam* jurisdiction. Thus, section 981(h) does give the district courts expanded pwer to resolve a criminal defendant's rights in a related *res* even though service cannot be effected because the property is outside the court's territorial jurisdiction. *See 11205 McPherson Lane*, 754 F. Supp. at 1484.

We realize that our result requires the government to file a second civil forfeiture action in the district court where the *res* is found if it wishes to affect any rights persons who are not subject to the territorial jurisdiction of the district court in which the related criminal prosecution is pending may have in a related *res*. Having

already defeated a criminal defendant who claims the *res*, this second filing is not likely to be necessary unless a lienholder or an innocent owner not present in the district where the criminal proceeding is pending files a claim.

C.

Unfortunately, our conclusion that section 981(h) does not allow extra-territorial service of process does not end our inquiry into the district court's power to adjudicate Friko's claim to ownership of the accounts that are the *res*. We must still consider whether the district court has otherwise obtained personal jurisdiction over Friko that would enable it to adjudicate Friko's rights in a *res* located outside the court's territorial jurisdiction. *See Mitchell v.Maurer*, 293 U.S. 237, 244 (1934). Our review of this issue also is plenary. *See Bumberg*, 952 F. 2d at 766.

The record before us does not show any contacts between the District of New Jersey and Friko beyond Friko's connection with the *Cardona* criminal prosecution and this case. However, in both the criminal prosecution and civil forfeiture proceeding, Friko waived any objection it may have had to the *in personam* jurisdiction of the District Court of New Jersey. Although the criminal summons issued against Friko

could not properly be served on Friko in Panama, *see* Fed. R. Crim. P. 4(b) ("the summons may be served at any place within the jurisdiction of the United States"), Friko appeared in the *Cardona* prosecution pursuant to a corporate resolution signed by Daccarett (though Daccarett himself did not appear). Thus, Friko's submission to the District Court of New Jersey's jurisdiction was voluntary.

Already litigating the criminal prosecution in the District Court of New Jersey, Friko voluntarily submitted itself to the *in personam* jurisdiction of the District Court of New Jersey for purposes of the civil forfeiture proceeding. Even assuming that Friko's appearance in the criminal action did not waive any *in personam* objection to the district court's jurisdiction in the civil forfeiture action, when Friko filed its claim of ownership to the *res* that is the subject of this forfeiture proceeding without objecting to the district court's *in personam* jurisdiction as well as its *in rem* jurisdiction, it waived its objection to the district court's inability to effect service of process beyond the court's territorial boundaries. *See Gottlieb v. Sandia American Corp.*, 452 F. 2d 510, 515 (3d Cir.), *cert. denied*, 404 U.S. 938 (191); *see also* 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*

§3522, at 78 (2d ed. 1984) ("jurisdiction over the person is a waivable defect, which must be asserted early in the action by the party who would take advantage of it"); *cf.* Fed. R. Civ. P. 12(h)(1) (describing steps to be taken to preserve defense of lack of *in personam* jurisdiction). Accordingly, we hold the district court had power to adjudicate the right to the accounts as between Friko and the Government.

Because the district court lacked *in rem* jurisdiction, it did not, however, have the power to enter an adjudication determining that the government's right to the *res* was superior to all potential claimants. Such a determination of title in the *res* paramount to the whole world is precisely the effect of the district court's May 24, 1991, order entering a default judgment in favor of the government on the forfeiture complaint. Therefore, that order must be vacated.

V.

Since the district court did have *in personam* jurisdiction over Friko, and thus could adjudicate ownership of the account as between Friko and the government, we are led at last to Friko's arguments on standing, the fugitive disentitlement doctrine and the district court's denial of its request for reargument.

A.

The district court held that Friko *qua* Friko lacked standing to challenge the forfeiture because it was merely a shell for Daccarett, a creature, as it were, without existence apart from the creator whose identity it masked. Friko's standing to contest the forfeiture is a question of law over which we exercise plenary review. *See United States v. Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991). Nevertheless, the district court's findings on the facts that underlie its legal conclusion as to standing cannot be set aside unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied*, 454 U.S. 1184 (1982).

In forfeiture, as elsewhere, we must distinguish between standing conferred by statute and the standing requirements of Article III to the Constitution. Article III standing requires the claimant to show an interest in the property sufficient to create a "case or controversy," while statutory standing requires claimants to comply with certain procedures. *See United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262 (2d Cir. 1989). Friko maintains that it has fulfilled both the statutory and constitutional prerequisites for standing. It again

relies on the Supplemental Rules and contends they provide the only statutory prerequisite for standing is the filing of a claim.[7] If so, when Friko filed its claim to obtain standing, it has complied with the only formality required.[8] Friko goes on to assert that it also has Article III standing because it holds legal title to the accounts.

The government does not dispute Friko's statutory standing under Supplemental Rule C(6). Thus, we are left with the question whether Friko had Article III standing.

The government concedes Friko's legal title but then question its legal existence as an entity apart from Daccarett, as if Daccarett, masked and cloaked in the garments of Friko, had stolen, incognito, onto our shores. According to the government, it is Daccarett's standing that is in question, and the government contends

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7 Supplemental Rule C(6) requires that "[t]he claimant of property that is the subject of an action in rem shall file a claim." Supp. R. C(6).

8 Even though this is not an admiralty or maritime claim, the Supplemental Rules apply to this action because the forfeiture statutes provide an action analogous to a maritime action *in rem*. *See supra* note 4.

that he has none because he is a fugitive whose access to court is precluded by the fugitive disentitlement doctrine.

Article III standing is commonly associated with an inquiry into injury-in-fact, causation, redressability and other prudential factors, *see, e.g., Warth v. Seldin*, 422 U.S. 490, 498-502 (1957), but the inquiry is more focused in forfeiture cases. Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it. *See United States v. $321,470.00 in United States Currency*, 874 F.2d 298, 303-04 (5th Cir. 1989) (ownership or possessory interest sufficient); *United States v. $122,043.00 in United States Currency*, 792 F.2d 1470, 1473 (9th Cir. 1986) (possession sufficient); *see also* Smith, *supra* at 9-57 & n.10.1 (discussing Article III standing of claimants). But *see United States v. $38,570.00 in United states Currency*, 950 F.2d 1108, 1112-13 (5th Cir 1992) ("[T]he claimant must come forth with some evidence of his ownership interest in order to establish standing to contest a forfeiture [in a forfeiture under section 881(a)]."") (emphasis omitted). We see little analytic difference between *Warth's* approach and the owner-possessor approach in forfeiture cases. An owner or possessor of property that

has been seized necessarily suffers an injury that can be redressed, at least in part, by return of the seized property.

B.

Though it is undisputed that Friko had legal title to the seized account, "courts have uniformly rejected standing claims put forward by nominal or straw owners. Thus, even possession or legal title to the *res* may be insufficient to establish standing to contest the forfeiture." Smith, *supra* at ¶ 9.04, at 9-58.6. Case law is in accord with the statement in Smith. In United States v. One 1981 Datsun 280 ZX, 563 F. Supp. 470 (E.D. Pa. 1983), the court disregarded a car's legal title and denied a father standing because it was his son who stood "to suffer from the Datsun's forfeiture." *Id.* at 475. The court relied on evidence that the car was referred to as the son's that the son frequently drove the car but the father did not, that the car was "turbocharged and capable of great speed" but the father was 72 years old and suffered from a heart condition and that the father did not pay for the car. *Id.* Thus, though the car was kept at the father's house and the father held legal title to it, the district court held the father did not have standing to contest the forfeiture because the son exercised dominion and control over the car. *Id.* at 476.

In *One Datsun 280 ZX*, the court relied on *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27 (8th Cir. 1979) *(1945 Douglas I)*, *appeal after remand*, 647 F.2d 864 (8th Cir. 1981) *(1945 Douglas II)*, *cert. denied*, 454 U.S. 1143 (1982). There, the district court initially ordered forfeiture of an aircraft to the government. *1945 Douglas I*, 604 F.2d at 27. An intervenor who held legal title to the aircraft appealed. The government contested this intervenor's standing in the district court but that court did not decide the standing issue. The court of appeals then refused to reach the merits, holding that the standing question should be examined by the district court in the first instance. *Id.* at 29. Although the intervenor had tendered the money to purchase the aircraft, the courts of appeals noted that an individual named Albert Kammerer (Kammerer) had actually provided the funds. The record in the district court contained evidence tending to show that, on Kammerer's demand, the intervenor gave him a blank bill of sale for the aircraft. *Id.* It also showed that Kammerer considered himself the owner of the aircraft. *1945 Douglas II*, 647 F.2d at 866.

On remand, the district court held that Kammerer was the true "owner" of the *res*. *Id.* The court of appeals then affirmed on the merits because "[t]he

evidence is consistent with Kammerer's dominion and control," *id.* at 867, and therefore the district court's conclusion was not clearly erroneous, *id.* at 866; *see also United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1988) ("[t]he evidence is consistent with Kammerer's dominion and control," *id* . At 867, and therefore the district court's conclusion was not clearly erroneous, *id.* at 866; *see also United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1988) ("[P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture.") (citing *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 630 (11th Cir. 1986) (emphasizing dominion and control in determining standing in a forfeiture case.))

In this case, the district court was faced with a subtly different issue. The government not only argued that Daccarett actually exercised dominion and control over the money in Friko's accounts, it also argued that Daccarett was, for all intents and purposes, Friko. That distinction does not change our analysis.

Once the government made out a *prima facie* case, Friko had the burden of establishing its independent power to control the accounts. *See $3,470.00 in*

United States Currency, 874 F.2d at 302. The governments evidence persuaded the district court that the New York accounts in Friko's name were linked in money laundering. It noted that Friko's directors were all members of Daccarett's family and that it was Daccarett himself who had authorized Friko to file its claim while he remained in Colombia, safe from prosecution. This evidence was enough to meet the government's initial burden and shift to Friko the burden of coming forward with some evidence to show that it had independent existence and could exercise dominion and control over the account independent of Daccarett. *See 528 Liscum Dr.*, 866 F.2d at 217.

Friko's efforts to rebut the government's evidence that Daccarett, not it, actually owned and controlled the accounts were feeble. It relied in large part on Jafri's affidavit describing the parallel market for dollars in Colombia and his assertion that Colombian businessmen customarily hold dollars in United States banks. Jafri's affidavit tell's us nothing about Friko's identity *vis-á-vis* Daccarett; it only describes the practice of Colombian businessmen in transactions exchanging foreign currencies for dollars. Friko also offered the affidavit of accountant H. Charles Hess (Hess), to rebut the governments evidence on Friko's lack of existence apart from Daccarett. Hess merely attested to Friko's incorporation

and the opening of the accounts in question. His affidavit said nothing about Friko or Daccarett's operations in the business world. Saad's affidavit, the final piece of evidence Friko submitted before entry of the order striking its claim, asserts only that Daccarett was in the textile business. Saad says nothing about Friko's business. Friko's documentary evidence verifies its formation as a corporation, its power to open the seized accounts and to litigate this claim, but it does not tend to show that Friko itself conducts any kind of trade or business beyond holding legal title to various accounts, nor to establish Friko's existence independent of Daccarett.

If Friko had an independent existence, it should have presented evidence of legitimate business dealing in its own right. For example, if Friko were engaged in exchanging pesos for dollars in the parallel market, it should have been able to produce evidence of transactions with currency traders other than those the records shows as linked to the laundering of drug proceeds. Under the circumstances, the district court's finding that Friko was a straw owner of accounts owned and controlled by Daccarett was not clearly erroneous. Therefore, it did not err in entering the order of April 8, 1991, striking Friko's claim for lack of

standing to contest the seizure.[9] Since that order was a final determination of Friko's rights in the *res*, Friko has forfeited to the government whatever rights it may had in the accounts unless the district court erred in its order denying Friko's motion for reargument. That question is the subject of Friko's appeal at our Docket No. 91-5768, to which we now turn.

VI.

To decide Friko's appeal at No. 91-5768, we again confront a threshold problem: the district court's power to adjudicate the motion for reargument. To that question we must determine whether

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[9] Once the district court determined Friko was a straw man for Daccarett, it applied the fugitive disentitlement doctrine since Daccarett had not appeared for his criminal proceeding. The district court declared he was a fugitive who could not challenge the forfeiture. On appeal, the parties continue to dispute the application of the fugitive disentitlement doctrine in the forfeiture context.

We do not need to reach this question because Daccarett has not filed a claim pursuant to Supplemental Rule C(6) and he therefore lacks statutory standing. However, even if we were presented with the issue, we believe the holding of the United States Court of Appeals for the Second Circuit that fugitive disentitlement does apply in forfeiture proceeding is persuasive. *See Eng*, 951 F.2d at 466-67

the district court correctly treated Friko's motion for reargument as a Rule 59(e) motion for reconsideration of a final order. If so, it would be untimely under Rule 59(e) because it was filed over a month after the April 8 order. Friko contends that the district court erred in treating its motion for reargument as a Federal Rule of civil Procedure 59(e) motion instead of a motion brought under either Federal Rule of Civil Procedure 55(c) or Federal Rule of civil Procedure 60(b). If brought under Rule 55(c) or Rule 60(b), Friko's motion for reargument was timely and the district court should have exercised the discretion it has to decide whether to review the merits of Friko's motion. Friko argues its motion for reargument falls within the aegis of rule 55(c) or 60(b) rather than 59(e) because it sought to submit new evidence on the standing issue and Rule 59(e) does not cover situations where a party seeks consideration of new evidence.

Unless we first determinate the nature of the May 31 motion, we cannot decide how it was affected by the filing of the notice of appeal on the same day. Since this issue goes to the jurisdiction of the district court, our review is plenary. *See Bumberger*, 952 F.2d at 766-68.

In its May 31 motion for reargument, Friko cited only Rules 60(b) and 55(c). It asked the district court to vacate its final judgement that the

res was forfeited to the government and allow the presentation of additional evidence set out in Rodriguez's affidavit. It said the district court should grant this relief because of the exceptional circumstances of the case, the large sum that it would lose if forfeiture were granted. It contends that Rodriguez's affidavit is new evidence and shows that Friko did have an independent existence as a closely held family business and was not a mere mask for Daccarett and that the delay in gathering this additional evidence was occasioned by problems in communicating with Friko's Spanish-speaking staff in Colombia.

While Friko sometimes referred to its motion as one for reconsideration (one more likely to fall under Rule 59(e)), it expressly relied on Rodriguez's affidavit as a reason why the judgment should be vacated. The character of a motion is determined by its function, not its title. *See, e.g., Keith v. Truck Stops Corp. Of Am.*, 909 F.2d 743, 746 (3d Cir. 1990); *Venen v. Sweet*, 758 F.2d 117, 122 (3d Cir. 1985). The facts related in Rodriguez's affidavit indicate to us that Friko's motion was a Rule 60(b) motion. Rule 59(e) does not permit a party to present additional evidence as a basis for

relief.[10] In addition, the district court had already entered a default judgment that the *res* was forfeited to the government before Friko filed its motion reargument.[11] Even though Friko says it did not know of the entry of the default judgment at the time it filed the motion for reargument, we think the district

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Rule 60(b) reads, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) ... or (6) any other reason justifying relief from the operation of the judgment.

Fed R. Civ. P. 60(b). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

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Friko says he never received notice of the government's default motion or of entry of default. It thus assumed a default judgment had not yet been entered since Federal Rule of Civil Procedure 55(b)(2) requires notice of default motions to all parties who have appeared at least three days before a hearing on the motion.

court should have treated it as a Rule 60(b) motion because only Rule 60(b) allows a party to obtain relief from a default judgment. *See* Fed. R. Civ. P 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."") (emphasis added). We hold that Friko's motion is a Rule 60(b) motion and therefore the district court erred in treating it as untimely under Rule 59(e).

Motions under Rule 60(b) "shall be made within a reasonable time, and for reasons (1) (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b); *see Hancock Indus. V. Schaeffer*, 811 F.2d 225,239 (3d Cir. 1987). Friko's motion was made 53 days after the April 8 order. It was timely. The government argues, however, that Friko's notice of appeal at No. 91-5740, files the same day as the motion for reargument, divested the district court of power to hear any motion other than a Rule 59(e) motion and therefore Friko's appeal at No. 91-5768 must be dismissed for lack of appellate jurisdiction since it was filed before the district court had ruled on it. The filing of a notice of appeal does nor divest a district court of jurisdiction to *entertain* a Rule 60(b) motion. *See Main Line Fed. Savs & Loan Assoc. v. Tri-Kell Inc.*, 721 F.2d 904, 906 (3d Cir. 1983). The

district court's failure to rule on the motion before an appeal is filed or thereafter either to deny the motion or signify its intent to grant it leaves nothing for a court of appeals to review with respect to the merits of the motion. Thus, the district court retained the power to deny it, *see Venen*, 758 F.2d at 123, or to notify Friko that it would, if given the power, grant the motion. In the latter case, Friko could have asked this Court to remand the case to the district court for the purpose of considering the motion, see Main Line, 72 F.2d at 906; *see also Hancock Indus.*, 811 F.2d at 239-40 (discussing *Venen* and *Main Line*). Because the district court incorrectly decided Friko's motion for reargument was an untimely Rule 59(e) motion, it neither denied Friko's motion nor signalled its intention to grant it. Friko's Rule 60(b) motion for reargument is thus still pending in the district court. We will therefore remand the case to the district court that it may exercise its discretion to either grant or deny Friko's motion for reargument.[12]

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12 The government argues on the merits that the evidence Friko wants to present is not newly discovered, merely newly presented. We do not reach that question and can express no view on whether the motion should be granted nor any view as to whether the motion meets the requirements of any of the subsections of rule 60(b).

VII.

In summary, on the appeal of docket No. 91-5740, we hold that the district court had *in personam* jurisdiction over the dispute between Friko and the government and that venue was properly laid in the United States District Court for the District of New Jersey. We also hold that, on the record before it, when it entered its order striking Friko's claim the district court did not err in deciding Friko had no standing to contest the forfeiture because it was a nominal party. In that appeal we will affirm the order of the district court striking Friko's claim and the order entering a default against Friko but, since the district court lacked *in rem* jurisdiction, we will vacate the May 24, 1991 order entering a default judgment in favor of the government. On the appeal docketed at No. 91-5768, we will, remand the case to the district court so that it can exercise the discretion it has on Friko's Rule 60(b) motion to reconsider its judgment against Friko in light of the additional evidence Friko claims it could not have assembled before the district court granted the government's motion to strike Friko's claim.

UNITED STATES TAX COURT

FRIKO CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No.26693-91
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent.	)	

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED: That the following statement shows the deficiencies in income taxes, and additions to the tax due from the petitioner for the taxable years 1985 through 1989, without taking into consideration the jeopardy assessment made May 6, 1991:

	Deficiency	Additions to Tax/Penalties	
Year	in Tax	6651(a)(1)	6654
1985	$ 731.40	None	None
1986	29053	None	None
1987	31799	None	None
1988	4499	None	None
1989	13250	None	None

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that the petitioner is not entitled to attorney's fees under I.R.C. § 7430.

It is further stipulated that interest will be assessed as provided by law on the deficiencies due from the petitioner.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6213 (a) prohibiting collection of the deficiencies (plus statutory interest) until the decision of the Tax Court becomes final.

STUART L. BROWN
Chief Counsel
Internal Revenue Services

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Tel: (305)982-5324

UNITED STATES TAX COURT

JOHNNY DACCARETT, ALTER EGO, NOMINEE OF FRIKO CORPORATION,	)	
Petitioner,	)	
v.	)	Docket No.22854-92
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent.	)	

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED: That the following statement shows the deficiencies in income taxes, and additions to the tax due from the petitioner for the taxable years 1985 through 1989, without taking into consideration the jeopardy assessment made July 28, 1992:

	Deficiency	Additions to Tax/Penalties	
Year	in Tax	6651(a)(1)	6654
1985	None	None	None
1986	None	None	None
1987	None	None	None
1988	None	None	None
1989	None	None	None

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that the petitioner is not entitled to attorney's fees under I.R.C. § 7430.

It is further stipulated that interest will be assessed as provided by law on the deficiencies due from the petitioner.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6213 (a) prohibiting collection of the deficiencies (plus statutory interest) until the decision of the Tax Court becomes final.

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Form 668(Z)232	Department of the Treasury-Internal Revenue Services **Certificate of Release of Federal Tax Lien**

District SOUTH FLORIDA	Serial Number 659208134	For Use by Recording Office

I certify that the following named-taxpayer under the requirements of section6325(a) of the Internal Revenue Code has satisfied the taxes listed below and all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on July 10, 1992, is authorized to note the books to show the release of these lien for these taxes and additions.

Name of Taxpayer
FRIKO CORPORATION, A CORPORATION

Residence
801 BRICKWELL AVE
MIAMI, FL 33131

COURT RECORDING INFORMATION:

LIBER	PAGE	UCC NO.	SERIAL NO.
15583	0571	N/A	92R265563

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1120	31411	65-0189143	33360	37043	219997
1120	31776	65-0189143	33360	37043	1135244
1120	32141	65-0189143	33360	37043	936506
1120	32507	65-0189143	33360	37043	223071
1120	32872	65-0189143	33360	37043	423449
Place of filing COUNTY COURTHOUSE DADE COUNTY MIAMI, FL 33130				Total $	2938267

This notice was prepared and signed at FT. LAUDERDALE, FL, on this, the 02ND day of FEBRUARY, 1998.

Signature	Title FOR CHIEF, SPF